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Sun Earth Solar Power Co., Ltd. and NBSolar USA Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SUNEARTH, INC., THE SOLARAY
CORPORATION,

Plaintiffs,

vs.

SUN EARTH SOLAR POWER CO., LTD.,
NBSOLAR USA INC., DOES 1 – 10,

Defendants.

Case No. 11-cv-04991 CW

**DEFENDANTS' DIRECT EXAMINATION
OF YUMING DONG**

1 I declare under penalty of perjury:

2 1. I am Senior Marketing and Sales Manager for Defendant Sun Earth Solar Power
3 Co., Ltd. (“SESP”), the parent corporation of Defendant NBSolar USA Inc. (“NBSolar USA”).

4 **I. BACKGROUND**

5 **SESP and Its Worldwide Use of “Sun Earth”**

6 2. SESP and its predecessor companies have manufactured photovoltaic (“PV”) panels in China since 1978. SESP was the first manufacturer of solar cells and solar panels in
7 China. By the year 2000, SESP had become a substantial PV panel manufacturer within China.
8 In 2004, SESP began exporting its products, principally to Germany and other countries in
9 Europe. Today, SESP’s manufacturing capacity places it among the world’s largest PV panel
10 manufacturers. In 2011, for example, SESP had sales of about \$410 million and exported its PV
11 panels to more than 60 countries around the world. Only about 2% of sales, however, were to the
12 United States.

13 3. Beginning in 1978, SESP’s PV panels were branded with the Chinese words for
14 “Sun Earth”. The Chinese version of SESP’s “Sun-Earth” brand is famous in China’s solar
15 power electricity industry. In 1996, SESP registered in China the Chinese-language form of
16 “Sun-Earth” as a trademark.

17 4. In 2004, when it entered international markets, SESP changed the branding on its
18 PV panels from the Chinese to the English version of its “Sun-Earth” trademark. Most of SESP’s
19 international customers have come to know it by the English “Sun-Earth” brand under which it
20 has done business internationally.

21 5. The Sun-Earth trademark includes the familiar circle and line design symbolizing
22 the sun and the earth (“SUN-EARTH logo”):¹
23
24
25
26

27 ¹ To avoid confusion, I use “SUN-EARTH logo” to refer to the circle and line design and “Sun-
28 Earth trademark” to refer to the combination of the SUN-EARTH logo and the words “Sun-
Earth.”



6. Prior to 2010, SESP was named “Ningbo Solar Electric Power Co., Ltd,” because it was located in Ningbo, China. That name, however, was more difficult for foreigners to pronounce than “Sun-Earth.” As SESP’s presence in the international market grew, we felt that our city name, Ningbo, hindered SESP’s growth under the “Sun Earth” brand because it was inconsistent with the name by which most international customers recognized us – namely, “Sun-Earth.” Therefore, in 2010, SESP changed its name from “Ningbo Solar Electric Power Co., Ltd.” to “Sun Earth Solar Power Co., Ltd.” to correspond with the “Sun-Earth” brand it had been using for more than 30 years.

7. Changing to the SESP name in 2010 was a time-consuming and expensive process. In China, we were required to obtain the following: approval by the Ningbo Administration for Industry and Commerce; a business license; registration under the new name with tax bureaus, banks and numerous governmental authorities which regulate aspects of SESP’s operations, including the Customs Authority, Foreign Exchange Authority, Environmental Protection Authority, and National Land Authority.

8. In addition, due to the large scale of SESP’s international operations the effects of the 2010 name change were felt around the world. For example, substantial company resources were required to ensure that SESP’s name change complied with the various legal requirements in the more than 50 countries in which SESP does business. Despite these costs, SESP invested the time and money required to change its name because it was important to SESP that it project a uniform global brand.

Use of the NBSolar and Sun-Earth Trademarks in the United States

9. In addition to the Sun-Earth trademark, in 2007 the company had an auxiliary trademark, NBSolar, which was a shortened form of the company's then "Ningbo Solar" name. That mark also included the "SUN-EARTH logo":



Although that trademark has been used to an extent in some countries other than the United States, prior to 2007, SESP had primarily used the Sun-Earth trademark in connection with the sale of its goods internationally.

10. SESP's original sales efforts in the United States in 2006-07 and actual sales in 2007 were under the Sun-Earth trademark. In 2007, however, we regarded the United States as a brand new market for us, with the potential to grow to be the second largest market (after Europe) for PV panels. Since, at that time, the Sun-Earth trademark was as yet little known in the United States, we decided it would be a good idea for us to promote the NBSolar trademark in that country.

11. In late 2007, we thus phased out the use of the Sun-Earth trademark on goods shipped to the United States in favor of the NBSolar trademark. That situation continued until the end of 2010.

12. In January 2010, NBSolar USA was formed as a California corporation. At that time, we were still using, on products shipped to and sold in the United States, the NBSolar trademark pictured above, i.e., the NBSolar portion of the new company's name under the SUN-EARTH logo.

13. When we had started using the NBSolar trademark in the United States in late 2007, we had assumed that our global customers would recognize the affiliation of the NBSolar brand with SESP based on the common SUN-EARTH logo. By 2010, however, we came to

1 realize this had been a mistake. By not using a uniform, global brand, we had created a risk that
2 utility companies who knew SESP as “Sun-Earth” in the European markets would not recognize
3 the affiliation between SESP and the NBSolar brand. To avoid this problem and capitalize on the
4 goodwill that we had established globally, in late 2010 we once again began prominently using
5 the same Sun-Earth trademark in the United States that we were using globally.

6 14. By affiliating SESP’s global Sun-Earth trademark with NBSolar USA in the
7 United States, we were hopeful that utility companies in America would associate with NBSolar
8 USA the goodwill that SESP had established with utility companies around the world.

9 **II. LIKELIHOOD OF CONFUSION**

10 **SESP’s Unopposed Registration of the Sun-Earth Mark in the United States**

11 15. Beginning in 1994, SESP applied for and received trademark registrations for both
12 the Sun-Earth and NBSolar trademarks in numerous countries. We underwent the expense of
13 these international filings because we wanted assurance that we could use these names in those
14 countries. We did not want to become involved in trademark disputes. Rather, we presumed that
15 obtaining a trademark registration from the appropriate governmental authority in a country
16 would give us the right to use the registered trademark there.

17 16. I have reviewed with our lawyers certain of the files for our United States
18 registration. Those files showed that in 2006, SESP filed in the United States an application for a
19 registration to the Sun-Earth trademark and design, illustrated in Paragraph 5 above, stating an
20 intent to use that trademark on our products. Although the United States Trademark Office (the
21 “Trademark Office”) allowed the trademark, because a statement of use was inadvertently not
22 filed the Trademark Office deemed that first application abandoned. In 2008, SESP re-applied
23 for registration of the Sun-Earth trademark and design. The Trademark Office conducted a search
24 for conflicting marks (Ex. 66 at 50) and the Sun-Earth trademark was published for opposition
25 twice, first, in July 2007, and then again, in November 2009. The files show that neither
26 Plaintiffs, nor any other party, opposed registration and that, in December 2010, the Sun-Earth
27 trademark was added to the Principal Register.
28

1 17. When the registration issued, we fully believed that we had the right to use the
2 trademark on our goods in the United States. As noted, after publication twice, no one had
3 objected to such use and, after conducting a search, the United States government had granted our
4 application.

5 18. In June 2011, however, several months after SESP had returned to using the Sun-
6 Earth trademark rather than the NBSolar trademark in the United States, and six months after the
7 Trademark Office had granted our unopposed registration, we were surprised to receive notice
8 that Plaintiffs had filed with the Trademark Trial and Appeal Board (TTAB) a petition to cancel
9 SESP's Sun-Earth registration. At the time we received that unexpected notice, we in good faith
10 expected that, if the matter was not first settled, the Trademark Office would likely reject the
11 petition, on the ground that there was no likelihood of confusion with SunEarth Inc. SESP's
12 belief was based on: (1) the Trademark Office's different classifications for solar water heating
13 (SWH) and PV industries; (2) the differences between the SWH and PV industries; (3) the care
14 and sophistication of customers; and (4) the absence of any evidence of actual confusion.

15 **The Trademark Office Classifies Solar Thermal and Photovoltaic Systems Separately**

16 19. I understand from our Trademark Office file that the Trademark Office recognizes
17 the difference between SWH and PV systems by categorizing them under separate trademark
18 classifications. PV systems are classified under Class 9, which includes "apparatus and
19 instruments for conducting, switching, transforming, accumulating, regulating or controlling
20 electricity." (Ex. 73 at 5.) By contrast, SWH systems are classified under Class 11, which covers
21 "apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating,
22 water supply and sanitary purposes." (Ex. 73 at 6.)

23 20. SESP's registration of the Sun-Earth mark is limited to Class 9. (Ex. 66 at 5.) By
24 contrast, and consistent with the Trademark Office's classification scheme, I understand from its
25 filing that Plaintiff Solaray applied to register its logo and the Sun-Earth mark in Class 11, but not
26 in Class 9. (Exs. 112 & 113 at 10.)

27 21. The files show that during our prosecution of the Sun-Earth mark, the Trademark
28 Office rejected SESP's use of "solar panels" in Class 9 to identify its goods "because it is too

1 broad and could include goods in other international classes.” (Ex. 66 at 50.) Ironically, the
2 Trademark Office then proposed that SESP change its description to “solar heat collection panels
3 in Class 11.” (Ex. 66 at 50.) (The Trademark Office issued a similar rejection to SESP’s co-
4 pending application for registration of the NBSOLAR mark. (Ex. 67 at 28.)) Had we accepted
5 that suggestion, then I believe that our registration would have been broad enough to cover
6 Plaintiffs’ products.

7 22. The files show that SESP, however, rejected the Trademark Office’s suggestion.
8 As explained in correspondence between SESP’s Chinese and United States trademark
9 prosecution counsel, “the examiner attorney misconceived our client products as thermal
10 installation.” (Ex. 72 at 6.) Instead, SESP retained the original Class 9 categorization and revised
11 its identification of goods to cover only “solar cells, solar panels, namely photovoltaic panels and
12 photovoltaic modules for the production of electricity; solar controllers, namely, photovoltaic
13 controllers.” (Ex. 66 at 49.)

14 23. The files thus show that we did not seek – and we did not receive – any trademark
15 rights with respect to the solar thermal industry, in which Plaintiff SunEarth conducts its business.
16 The narrow category as to which we sought and received trademark protection does not cover the
17 goods that Plaintiff SunEarth Inc. sells.

18 24. After receiving notice of this cancellation proceeding, we attempted to settle the
19 matter with Plaintiffs on the basis of both parties’ continuing to use their respective trademarks in
20 their respective industries. Under our proposal, SESP would confine its use of its United States
21 registered mark to the PV products for which the registration had been granted, and SESP would
22 not oppose SunEarth Inc.’s obtaining a registration for SWH products. Plaintiff, however,
23 rejected this proposal. (Ex. 21 at 2.)

24 **Differences Between Solar Water Heating and Photovoltaic Industries**

25 25. We have always regarded the solar water heating industry as entirely separate from
26 the photovoltaic industry. We have never participated in the SWH business, or anything close to
27 it. Because we are not in that industry, it has always seemed inconceivable to us that any person
28 in the United States with any knowledge of the PV industry would think that Plaintiff SunEarth

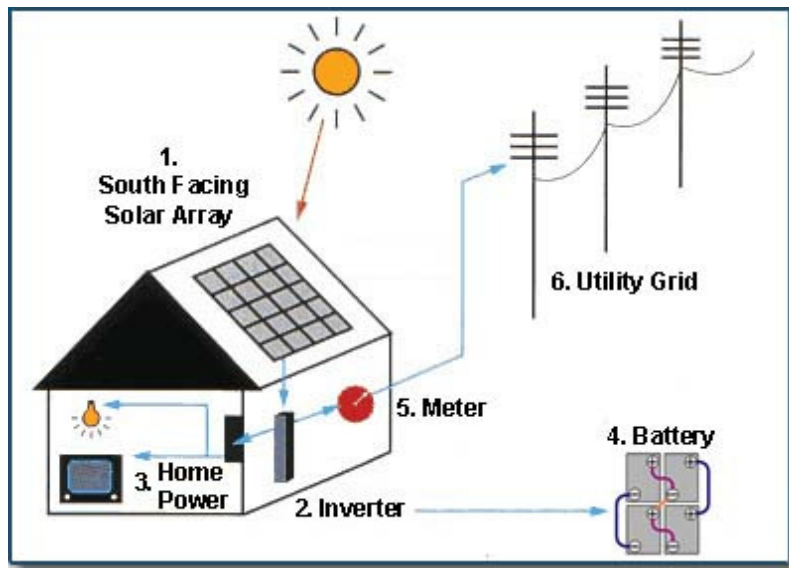
1 Inc. (assuming that he had even heard of that entity) would have any relationship to the panels
2 that we sell, or to our company. I have reviewed evidence from Plaintiffs, but none suggests
3 anyone would think that our sale of PV products in the United States had some connection with
4 them.

5 26. Solar energy technologies fall into four main categories:

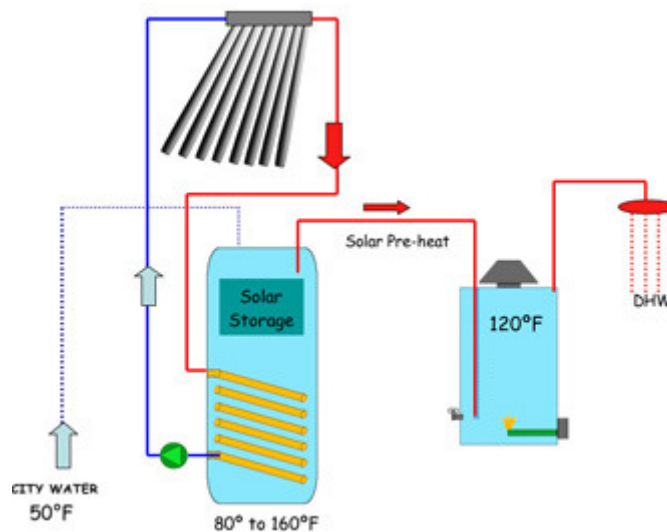
- 6 A) PV systems, which convert sunlight directly to electricity through PV cells;
- 7 B) SWH systems, which use a “solar collector” to either heat water directly or
8 heat a working fluid that then heats water;
- 9 C) Concentrating Solar Power systems, which use mirrors to concentrate
10 sunlight, thereby producing heat that is used to generate electricity; and
- 11 D) Transpired Solar Collectors, which use solar energy to preheat ventilation
12 air in buildings.

13 27. Defendants sell only PV systems, and are not involved in the SWH market, or the
14 other technologies. I understand that Plaintiffs have testified that, by contrast, under the SunEarth
15 name Plaintiffs market solar collectors and are not involved under that name in the PV systems,
16 or other, markets.

17 28. Our company has always believed that between the PV and SWH markets, the
18 products differ greatly. A typical PV system consists of five basic components: (1) a PV panel
19 made of many PV cells; (2) an inverter for a system tied to the utility grid or which requires
20 alternating rather than direct current; (3) a charge regulator or controller for stand-alone systems;
21 (4) one or more batteries for stand-alone systems; (5) and wiring. A basic PV system is shown
22 below:



29. By contrast, we understand SWH systems as consisting of a solar collector that faces the sun and absorbs solar energy. The solar collector is simply a box containing pipes through which a liquid is circulated, and heated by exposure to the sun. Typically, that liquid is an antifreeze mixture that carries the absorbed heat back to a storage tank. In the storage tank, heat is transferred from the circulating liquid to tap water, which can then be used by consumers. A simple SWH system is portrayed below:



30. As can be seen, the PV and SWH systems differ fundamentally, performing different functions. Further, we understand that the solar technologies each function in fundamentally different ways. PV systems use semiconductors to generate electricity directly from sunlight. Some PV systems are tied to the utility grid, enabling consumers to effectively sell

1 excess electricity. By contrast, we understand that SWH systems rely on absorption of thermal
2 energy by antifreeze circulating through copper pipes to heat household water supplies, and that,
3 unlike electricity, excess hot water in SWH systems cannot be sold back to the utility company.

4 31. Also separating the two industries are the different manufacturing processes and
5 technology required to produce PV and SWH systems. We understand that SWH systems
6 basically involve the production and welding of copper pipes. PV systems, by contrast, require
7 very different manufacturing processes: purification of silicon raw material; production of silicon
8 wafers; manufacture of solar cells by semiconductor technology; and assembly of PV panels.
9 These processes require expensive equipment and rare technical know-how. There is virtually no
10 overlap between the skills, methods, or materials used to manufacture solar collectors and PV
11 semiconductors.

12 32. Although both PV and SWH systems can be broadly classified as “solar energy
13 systems,” they form entirely separate industries. I understand that the United States Energy
14 Information Administration categorizes PV and SWH separately, and issues separate surveys to
15 PV and SWH manufacturers. (Ex. 331.) I also have learned the United States Customs and
16 Border Patrol also differentiates these two products by allocating a different Harmonized System
17 (HS) codes to them. The PV HS code is 8541.40.60.20 and the SWH HS code is 8419.19.00.40.

18 33. I understand that the State of California treats PV and SWH as separate industries.
19 California has separate solar incentive programs for PV and SWH. (Compare Ex. 332 with Ex.
20 333.) The California Solar Initiative-Thermal (CSI-Thermal) Program Handbook states that “To
21 receive a CSI-Thermal Program incentive, installed SWH equipment must...have a Solar Rating
22 and Certification Corporation (SRCC) or International Association of Plumbing and Mechanical
23 Officials (IAPMO) OG-300 System Certification.” (Ex. 332 at 19-20.) The requirements for
24 eligible PV systems are set forth in a separate handbook, which states “PV system components
25 (modules, inverters, and system performance meters) must be certified through the California
26 Energy Commission’s PV system certification program. The CEC provides a list of currently
27 certified eligible equipment on the Go Solar California site at
28 <http://www.gosolarcalifornia.ca.gov/equipment/>”. (Ex. 333 at 107.) SESP’s name is included in

1 that list, as required by law, but Plaintiffs' name does not appear because they do not manufacture
2 PV equipment. (Ex. 84.)

3 **The Parties' Customers Are Sophisticated and Distinct from One Another**

4 34. We manufacture PV products for only three markets: large-scale utility companies;
5 commercial rooftop applications; and residential markets. The capacity and cost of PV systems
6 for these three markets are roughly:

7 A) Utility: 5-50 megawatts, costing \$25-225 million;

8 B) Commercial: 100-1,000 kilowatts, costing \$600,000 to \$5.5 million;

9 C) Residential: 2-10 kilowatts, costing \$12,000 to \$80,000.

10 35. The vast majority of our business comes from international utility markets. In
11 particular, about 70% of our business is in Europe, about 15% in China and about 3% in the
12 United States.

13 36. Globally, our primary target is the utility market. In Europe, about 80% of our
14 business comes from the utility market. In the United States, however, we were just beginning to
15 develop relationships with utilities. As a result, about 95% of our United States sales have come
16 from the commercial market. We do not target residential customers. The small fraction of our
17 residential business is based on sales to installation companies.

18 37. Until we grow our PV business in the United States utility market, much of our
19 business will continue to come from commercial rooftop applications. We do not engage in any
20 business with individual homeowners, which I understand Plaintiff, SunEarth Inc., has testified is
21 its market. As a result, our customers are sophisticated business persons in the commercial
22 market, or, occasionally, installation companies who install PV systems in residential locations.

23 38. Although a small fraction of NBSolar's products reach the residential market, I do
24 not think it would be possible for a customer to mistakenly purchase a PV system when intending
25 to purchase a different solar energy system. A customer would notice the significant cost
26 differences between PV and SWH systems. As Plaintiffs acknowledge, a "SHW system is less
27 than 1/5 the cost of grid-tied PV system with an equivalent energy output." (Ex. 2 at 16.)
28

1 39. I know that the substantial cost of a new PV system requires many users to obtain
2 financing for the system. I believe that many of these government programs are limited to just
3 PV or just SWH systems. For example, I have been shown the California Solar Incentive
4 Program Handbook, which states that “PV systems are the only technologies eligible to receive
5 incentives from the SASH [Single-family Affordable Solar Homes] Program. Non-PV
6 technologies, including solar hot water systems, are not eligible for SASH Program incentives.”
7 (Ex. 333 at 27 n.8.) Therefore, I believe it would be impossible for a customer to mistakenly
8 purchase a PV system instead of a SWH system, or vice versa.

9 40. In the Court’s preliminary injunction order, the Court cited evidence that “[w]ithin
10 California, both types of products are installed by the same contractor.” (Dkt. No. 63 at 21.)
11 While it is technically accurate that the same contractor could install both systems, in practice this
12 is rare. In fact, I learned that the State of California has a separate training program for SWH
13 contractors, which PV contractors are not required to complete. Section 2.1.4.3 of the CSI-
14 Thermal Program Handbook states: “Contractors are required to attend a designated CSI-Thermal
15 Program training workshop. Attendance is required by the CSLB license owner and is
16 encouraged for other employees involved with the CSI-Thermal application process. Only
17 contractors who participate in this workshop will be eligible to apply for incentives from the
18 program.” (Ex. 332 at 15.)

19 41. There could be an occasional residential contractor who has been trained and
20 licensed to install a solar water heater in one customer’s house and PV panels in another
21 customer’s house (or in very rare cases, install both in the same house, although the products
22 would serve entirely different functions). But I believe that those would form a small and
23 sophisticated group. Some commercial developers, who install the quite expensive installations
24 described above, may have an occasional project that involves solar water heating. I believe that
25 these sophisticated purchasers would be quite aware of the market segmentation described above,
26 and would be highly unlikely to believe a United States manufacturer in one market has a
27 relationship with a Chinese manufacturer in another merely because of a similarity in name.
28

1 But if the person actually reaches the booth, however, he will readily realize that since all the
2 company at the booth sells are PV panels imported from China, that company is an entirely
3 different company from SunEarth Inc. But, in any event, anyone who actually comes to our
4 booth (or theirs) could not reasonably believe that the companies are related, particularly since
5 these shows are directed to industry insiders, not the public at large.

6 45. We have used the Sun-Earth mark to promote SESP's goods and services in
7 advertising accessible within the United States for several years. Before the Court issued its
8 preliminary injunction, SESP had displayed the Sun-Earth trademark on nbsolar.com since as
9 early as 2003. (Ex. 314.) Further, when we acquired the Sun-Earth.com domain name in 2007,
10 we configured the domain to redirect Internet visitors from Sun-Earth.com to nbsolar.com, which
11 was SESP's main website until we changed our name in 2010. Thereafter, I believe we displayed
12 the Sun-Earth trademark on the Sun-Earth.com domain until the Court's preliminary injunction
13 prohibited such use. (Ex. 166.)

14 46. Since 2005, we have placed ads using the Sun- Earth trademark in Photon
15 International, a magazine directed to the international PV market. (Ex. 320.) I understand from
16 information on its website, that a fraction of the copies of that publication (perhaps 20%) are
17 distributed in the United States.

18 47. I understand, however, that Plaintiffs have offered no evidence that either our use
19 of the trademark on websites accessible in the United States since 2003 or our advertising in
20 Photon International since 2005 has caused any confusion. I further understand that Plaintiffs
21 have testified that they never heard of us or our internationally known Sun-Earth trademark until
22 their own trademark application was rejected in March 2010.

23 48. I would attribute this ignorance to the separateness of the industries. Similarly,
24 when we began marketing the Sun-Earth brand in the United States in 2006-07, we were
25 ourselves not aware of the existence of Plaintiff SunEarth Inc. Our first knowledge of that
26 company came when I attended the Solar Power Conference in Long Beach, California, as a
27 representative of SESP in September 2007.
28

1 49. At the 2007 trade show, SESP was a Megawatt Sponsor and had reserved an
2 exhibitor's booth. When SESP initially registered for the Long Beach trade show, it submitted to
3 the show's organizers the Sun-Earth trademark as a logo. The records show that it appeared on
4 the Long Beach trade show website from about February 17 through at least April 28, 2007. (Exs.
5 318-319.)

6 50. At that time, however, we had been considering promoting the "NBSolar" mark in
7 the United States. At some point prior to the September 2007 trade show, we decided we would
8 rather have the organizers use the NBSolar mark than the Sun-Earth mark in the organizers'
9 materials. We thus submitted to the trade show organizers the NBSolar version for the organizers
10 to use at the trade show. At that trade show, I noticed that another exhibitor – Plaintiff SunEarth,
11 Inc. – also used a variation of "Sun Earth." Because of this similarity, I approached Plaintiff's
12 booth during the show, introduced myself, described our use of that mark, and exchanged
13 business cards. Because Plaintiff was (and remains) in a completely separate industry from SESP,
14 however, I was not concerned that we both used "Sun Earth" in our respective businesses.

15 51. From that point until June, 2011, when we were surprised to learn that Plaintiffs
16 had filed an action to cancel our trademark, we had not given any thought to that company. As
17 previously noted, that company was in a different industry, to which our trademark registration
18 had not been directed.

19 **SESP's Intent in Returning to the Sun-Earth Mark in 2010**

20 52. In the preliminary injunction order, the Court focused on "Defendants' intent in
21 switching from the use of the nbsolar mark to the use of the Sun-Earth mark, which their
22 representative admits happened in 2010." (Dkt. No. 63 at 27-28.) The Court concluded that
23 Defendants' "intent" supported a finding of likelihood of confusion because "Defendants had
24 actual knowledge of Plaintiffs' existence and their use of the Sun Earth mark and name." (Dkt.
25 No. 63 at 28.) The Court however, did not state that Defendants intended to cause confusion
26 between SESP and Plaintiff SunEarth, Inc., or to profit from it. Quite the opposite is the case.

27 53. We have never had any desire to be identified with, mistaken as, or perceived as
28 having any relationship with Plaintiff SunEarth Inc. To the contrary, we strongly believe that any

1 such identification, mistake, or perception would do absolutely nothing to help our business,
 2 either monetarily or reputation wise. We have our own hard-earned reputation, achieved through
 3 our worldwide activities since 2004 as a leading supplier of PV panels to major utilities, to
 4 preserve. We thus have had no motive to create, or to tolerate, any confusion between the entities.

5 **III. REMEDIES**

6 54. If the Court ultimately finds that our simultaneous appearance at trade shows in the
 7 United States caused unacceptable confusion, then I understand that the Court could enjoin us in
 8 that respect. Or if the Court ultimately finds that our use of the Sun-Earth brand caused
 9 unacceptable confusion, then likewise I understand that the Court could require that we use the
 10 NBSolar (or some other) brand. But if the Court does that, we would request that the Court not
 11 enjoin certain activity as to which no evidence of confusion has been shown – namely,
 12 inconspicuously identifying SESP as the manufacturer on Defendants’ NBSolar-branded panels
 13 and advertising in the international publication, PHOTON International.

14 **Identification of the Manufacturer**

15 55. For the reasons described below, SESP believes that ordinary business customs
 16 require that SESP be identified as the manufacturer on Defendants’ panels.

17 56. As explained above, “Sun Earth” forms a vital part of SESP’s corporate name
 18 around the world and thus SESP cannot change that name. Although after the preliminary
 19 injunction in February 2012, we switched to NBSolar in the United States as the brand for our
 20 products (and no longer use the “Sun Earth” brand), we believe it is nearly impossible to
 21 completely avoid using the SESP name in the United States. At numerous points along a panel’s
 22 journey from SESP’s factory in China to the end user in the United States, we are required to
 23 disclose the panel manufacturer’s name. For example, invoices, insurance agreements, packing
 24 lists, warranties, and other business contracts frequently require that SESP be identified. In
 25 addition, SESP, as the manufacturer of the PV panels distributed in the United States, must be
 26 identified as the party responsible for defects with the product. Generally, this is done with a
 27 small, inconspicuous manufacturers’ label on the back of the product. (As noted, however, all of
 28 these products are now branded in the United States only as “NBSolar” products.)

1 57. Defendants also believe they need to use the SESP trade name in order to purchase
2 from sellers in the United States equipment for manufacturing PV panels in China. SESP
3 purchases millions of dollars of equipment from sellers within the United States. SESP's trade
4 name needs to be used to complete these purchases. For example, SESP's trade name is used on
5 contracts, invoices, packing lists, bills of lading, and applications for letters of credit, which are
6 used when SESP purchases equipment for export from United States sellers to SESP in China.

7 58. Similarly, Defendants believe they need to be able to disclose to their customers,
8 partners, vendors, and other actors in the United States that SESP manufactures the NBSolar-
9 branded products. At trade shows in the United States, for example, Defendants need to be able
10 to explain the source of their products and the NBSolar-SESP affiliation. As above, Defendants
11 need to be able to explain to potential customers that the products being sold under the NBSolar
12 brand are identical to the products sold in Europe under the Sun Earth brand. The attendees at
13 such trade shows to whom these disclosures will be made would not be confused as to the source
14 of the goods as the disclosures themselves are directed to communicating that precise information.

15 59. A manufacturer's label, albeit inconspicuous, has particular practical importance to
16 customers. For example, I understand that Plaintiff SunEarth Inc. has testified at its deposition
17 that it is required to affix to its SWH products a label identical to Exhibit 26, which identifies
18 SunEarth Inc. as the manufacturer. (Reed Dep. at 166:10-11.) The label enables Plaintiffs to
19 track the product if there are quality problems. (Id. at 166:6-9.) The label must stay affixed to
20 Plaintiffs' products so that one can determine if there is a warranty. (Id. at 166:21-167:2.) It is
21 important to be able to determine warranty coverage because that affects a manufacturer's
22 liability. (Id. at 167:17-20.) The label also provides evidence that Plaintiffs' products are
23 certified by various organizations. (Id. at 164:19-165:6.) Such certifications must be present
24 when the product is resold and installed. (Id. at 164:15-18.) According to Plaintiffs themselves,
25 these certifications are required in 49 states and in the U.S. tax code in order to be eligible for
26 incentives and tax credits. (Id. at 165:15-20.) Florida requires that this information be affixed to
27 Plaintiffs' products in order to do business in that state. (Id. at 165:21-25.) Code officials who
28 inspect installations pursuant to a building permit and other requirements need to see this label.

1 (Id. at 165:3-6.) All flat plate collectors have these labels affixed to them. (Id. at 167:1-2.) All
2 of Plaintiffs' labels produced in this lawsuit identify SunEarth, Inc. (Exs. 26-30.)

3 60. We use our product labels, in the PV industry, for a role similar to that described
4 by Plaintiffs in the SWH industry. For example, we understand that, as a condition of
5 participating in solar incentive programs in the United States, many governments and utility
6 companies require that solar energy equipment be covered by a manufacturer's warranty. The
7 California Solar Initiative Program Handbook states: "California Public Utility Code 387.5(d)(4)
8 requires that all solar energy systems that receive an incentive must have a warranty of not less
9 than 10 years to protect against defects and undue degradation of electrical generation output."
10 (Ex. 333 at 35; see also Ex. 203 at 4.) The Handbook also states: "System Owners will
11 acknowledge on the Incentive Claim Form that they have received a 10-year warranty for no-cost
12 repair and replacement of the solar energy system." SESP complies with these requirements by
13 offering to consumers a 10-year warranty covering defects in material or workmanship and a 25-
14 year warranty covering panel performance. Exhibit 49 provides an example of the warranty we
15 offered in 2011, although the Sun-Earth mark has now been replaced with a NBSolar mark. As
16 we believe is required under California law, this warranty is distributed to purchasers of panels
17 manufactured by SESP, to enable consumers to identify and contact SESP should they encounter
18 problems. (Ex. 203 at 4.)

19 61. We believe the warranty, however, is only useful if consumers are able to contact
20 SESP. We are concerned that, should consumers misplace the warranty paperwork – which is
21 common over such a long period – in the absence of a manufacturer's name imprinted on the
22 panel itself, the consumers would generally be unable to identify SESP as the manufacturer to be
23 contacted about defective products. As Plaintiffs have noted, a label which identifies the
24 manufacturer ensures that one is able to determine whether warranty coverage exists and, in turn,
25 who bears liability for problems.

26 62. In addition to providing protection to consumers, the identification of SESP as the
27 manufacturer on the panels themselves has allowed SESP to discover and cure defects. Like
28 Plaintiffs, SESP has for many years relied upon purchasers' feedback to quickly identify

1 problems in our manufacturing process. We are concerned that removing SESP's name from the
 2 panel would interrupt this feedback, frustrating both purchasers and SESP's quality control
 3 procedures.

4 63. We understand that financial incentives in the form of tax credits or rebates from
 5 governments and utilities are widely available in the United States. Without these incentives the
 6 cost of PV panels is often prohibitive. We understand that incentive programs typically have
 7 equipment eligibility criteria to ensure the safety and efficiency of PV panels. In California,
 8 equipment included on the California Energy Commission (CEC) list is eligible for financial
 9 incentives. (Ex. 333 at 107; Ex. 203 at 4.) SESP's equipment is included in the CEC list, with
 10 SESP identified as the manufacturer. (Ex. 84.) SESP's customers worry that they will not
 11 receive these financial incentives if SESP is not identified on the product itself. (Ex. 203 at 4.)
 12 Plaintiffs have admitted that obtaining incentives and tax credits requires certification from
 13 various authorities, and a label is helpful – and, in some states, required – to demonstrate
 14 eligibility for such incentives.

15 64. Currently, SESP is identified on CEC's list as a manufacturer of PV panels. (Ex.
 16 84.) I understand that the CEC requires inspectors to verify that the manufacturer of the installed
 17 equipment matches the information that the purchaser previously submitted to assure that the
 18 equipment qualifies for solar incentives. The inspector can do this by checking on the name
 19 printed on the manufacturer's label. Section 4.9.1.1 of the CSI Handbook describes this
 20 requirement: "The inspectors will verify the System is installed in accordance with information
 21 provided on the Incentive Claim documentation, and in compliance with CSI handbook rules.
 22 The following are some examples of what will be inspected and verified:

23 Modules and Inverter(s)

- 24 • Manufacturer
- 25 • Model Number (if model nameplate is not visible, invoice is necessary for verification)
- 26 • Quantity

27 (Ex. 333 at 83.)
 28

1 65. I understand that Section 4.9.2.2 of the CSI Handbook explains that an inspector
2 can issue a failure for “[i]nstallation of PV modules, inverters and/or performance meters not on
3 the CEC’s list of eligible equipment or otherwise ineligible for incentives.” (Ex. 333 at 84.) We
4 are concerned that an inspector unable to verify the identity of a PV panel’s manufacturer could
5 issue a “failure.” We understand that failures can result in removal from the CEC’s incentive
6 program of applicants, solar contractors, system owners, or sellers. We are concerned that the
7 occurrence of such failures would ruin Defendants’ reputation among applicants and contractors,
8 which, in turn, would jeopardize Defendants’ ability to do business in the United States. SESP
9 includes SESP’s name on the nameplate to help inspectors to verify that its equipment is on the
10 CEC’s list, which should reduce the risk that failures will be issued.

11 66. Defendants’ customers in the United States have expressed concern to us when
12 they learned in February 2012 that they might be precluded from identifying SESP as the
13 manufacturer of panels in the United States. (Ex. 203, at 4.) Having submitted applications for
14 incentives which identified SESP as the manufacturer, several of our customers warned that their
15 federal incentives would be jeopardized if the panels they received were not identified as being
16 manufactured by SESP.

17 67. The United States Customs and Border Patrol (“CBP”) charges different tariffs to
18 different PV panel manufacturers. We understand that to avoid being incorrectly charged higher
19 tariffs, the CBP needs to be able to conveniently verify that SESP is the manufacturer of the
20 panels we import into the United States. We are concerned that prohibiting Defendants from
21 identifying on the panel itself the fact that SESP is the manufacturer would increase the likelihood
22 that the CBP would incorrectly impose a higher tariff. We are concerned that this, too, could
23 jeopardize our ability to do business under the NBSolar brand in the United States.

24 68. If the Court were to issue a permanent injunction that did not allow Defendants to
25 identify SESP as the manufacturer of NBSolar-branded products, no matter how inconspicuously,
26 because of business and legal constraints Defendants would be unable, as a practical matter, to
27 import and sell their NBSolar-branded products in the United States.
28

69. Nor would it be sufficient to use the abbreviation “SESP” in lieu of Defendant’s full name. Without an accompanying explanation that “SESP” is an abbreviation for “Sun Earth Solar Power Co., Ltd.,” people will not know that SESP refers to our company. When performing a field inspection of a PV system (as described in Section 4.9.1.1 of the CSI Handbook (Ex. 333 at 82-83), an inspector would have no practical way to verify that our panels are on the CEC list because the list does not include the SESP abbreviation, only the full name. (Ex. 84.) A PV system must be on the CEC list in order to be eligible for California’s various financial incentives. As explained in Paragraph 65, this could result in the issuance of a “failure,” which could eventually result in applicants, solar contractors, system owners, or sellers being removed from California’s incentive program. (Ex. 333 at 86.) As Plaintiffs themselves acknowledge, inspectors need to be able to see the information on such labels. (Reed Dep. Tr. at 165:3-6.) In an event, we are deeply concerned that SESP’s customers, who, because of their sophistication believe it is important that SESP’s full name appear on the label, would likely refuse to purchase SESP’s panels out of concern that financial incentives would be unavailable. (Ex. 203 at 4.)

Private Labeling Is Not a Feasible Alternative for SESP

70. Richard Reed, the CEO of Plaintiff SunEarth Inc., suggested that SESP’s products could be marketed under NBSolar’s name in the United States. (Dkt. No. 141, ¶ 23.) Based on Plaintiff SunEarth Inc.’s experience with one component (tanks) from one manufacturer (Rheem), Reed speculates that a private label arrangement “would not be complicated.” SESP’s circumstances, however, are far different. For several reasons, it is not feasible for SESP to use a private label arrangement to distribute its products in the United States.

71. Under a typical private label arrangement that we have encountered in our industry, the manufacturer makes products for a third party, which then sells the products under the third-party’s own brand, holds itself out to the world as the products’ source, and takes responsibility for warranties and servicing associated with the products. At my deposition, I had testified that SESP had a customer for which SESP had used the customer’s private label. Those products, however, were not part of SESP’s standard line of products, were not covered by SESP’s various

1 certifications (e.g., UL, CEC, etc.), and were not guaranteed by SESP. In addition, the private
2 labeler provided its own specifications for product design, materials, technology, and packaging.

3 72. In our experience, private labeling, where it occurs, has been initiated by the
4 customer itself and for its own business reasons. SESP has very few customers that practice
5 private labeling. By far the majority of SESP's customers insist that the actual manufacturer be
6 identified on the product, because they want to be able to show that the product was made by a
7 reputable producer.

8 73. Even if we could persuade our customers to enter a private label arrangement, it
9 would not be feasible to provide a different certification label for each customer. Since it began
10 selling PV panels in the United States in 2007, SESP has sold to the following 29 customers: (1)
11 ACA Technology Inc.; (2) Alpha Energy; (3) ATL Technology; (4) Boxermartin, Inc.; (5)
12 Calmonte Corporation; (6) CEIA-USA; (7) Centromax Group Inc.; (8) Clark Associates, Inc.; (9)
13 Cosmos Solar Energy Inc.; (10) Digital World Inc.; (11) Eco Innovations; (12) Everbright Solar,
14 Inc.; (13) International Development Corp.; (14) Lite Solar Corp.; (15) Lumen & Crystal; (16)
15 National Hardwood Flooring & Moulding; (17) Nbsolar USA Inc.; (18) Nicor Light Solar; (19)
16 Power Save Energy; (20) Ramsond (TN Trading Co. LLC); (21) Silicon Solar Ltd.; (22) Solar
17 Bridge; (23) Solarvision International; (24) Sun Sport Solar; (25) Sunnybrother DBA; (26) Surya
18 Energy Solutions, LLC; (27) Total Environmental Associates Inc.; (28) Waxman Industries, Inc.;
19 and (29) Wego Solar. (Ex. 92.)

20 74. Obtaining UL and CEC certification for each of its customers, as required under a
21 private label arrangement, would be prohibitively expensive. Each series of product must have a
22 separate certification. Currently, SESP has about 20 series of products on the CEC list, which
23 includes 80 types of products. (Ex. 84, at 3-5.) Adding these products to the CEC list in 2011,
24 after changing its name from Ningbo Solar Electric Power, cost SESP about 1.3 million RMB
25 (about \$200,000). (Ex. 92 at 10, § 4.2.) Repeating this process for each customer would be
26 extraordinarily expensive. It would also make it quite difficult for SESP to modify its existing
27 products or add new products because the re-certification would need to occur across all of its
28 customers.

1 75. We believe that a private label arrangement would also impede the role that a
2 manufacturer's label plays in ensuring quality control. (Reed Dep. Tr. at 166:1-12.) Private
3 labeling would insert SESP's many customers in between the end user and SESP. Technical
4 problems reported to the private label customer would then need to be reported back to SESP,
5 creating frustrating inefficiencies and the potential for miscommunication among customers,
6 distributors, and SESP.

7 76. Nor can SESP use NBSolar USA as the "manufacturer" on a private label. It is
8 possible that NBSolar USA may be shut down as a result of the difficult economic environment
9 for PV products, and also because of the expense of this litigation. All of its employees have
10 been laid off. It is unclear whether the company will exist in another year. As Plaintiffs
11 acknowledge, the company named on the manufacturer's label is the company that stands behind
12 the product. (Reed Dep. Tr. at 166:10-12 and 167:15-20.) SESP believes it cannot in good faith
13 identify NBSolar USA as the company that stands behind the warranty to Defendants' PV panels
14 given the uncertainty about NBSolar USA's future. (Ex. 333 at 35 (CSI Handbook, § 2.4
15 Warranty Requirements).) Reed's example regarding Apple Computer is illuminating, in this
16 respect. (Dkt. No. 141, ¶ 7.) When an iPad has a defect, it is Apple – a company with sufficient
17 resources to stand behind its product – that is expected to and actually does provide assistance.
18 Likewise, it is SESP, not NBSolar, that has the resources to stand behind warranties and handle
19 defective products.

20 77. Reed states that he "looked into this process to evaluate how to go about selling
21 photovoltaic systems made by other companies but sold by Solaray or SunEarth as Sun-Earth
22 branded products." (Dkt. No. 141, ¶ 23.) His example, however, involves many manufacturers
23 selling under one private label distributor. By contrast, SESP's scenario would involve a single
24 manufacturer selling products through numerous distributors. Plaintiffs' circumstances are
25 simply not comparable.

26 **SESP's Label Is Not Likely to Cause Confusion**

27 78. It is important to note that the name on the label has little, if anything, to do with
28 the sales/marketing of the product because, in general, our customers would not see the

1 manufacturer's label until after the product has been purchased and delivered. (Even then, the
2 customer would not likely examine the label, except for one of the purposes described below.)
3 As discussed above, the label serves an after-sale function.

4 79. Notably, despite our selling over \$8 million of panels bearing the Sun-Earth mark
5 in 2011, Plaintiffs have failed to identify a single instance of actual confusion relating to SESP's
6 use of the Sun-Earth mark on its products.

7 80. In any event, to narrow the issues, SESP changed its label, as of August, 2012, to
8 the label below, inconspicuously printing SESP's full name along with SESP's Chinese address
9 on the label (as depicted below). This is even less likely to cause confusion than the use of just
10 the Sun-Earth mark on Defendants' products.



1 which that publication is directed. I also understand from his testimony that, apart from Canada
2 and Mexico, that company has very little international sales at all.

3 86. Further, I understand that the PHOTON International website clearly states that the
4 publication is directed toward the “photovoltaics (PV) or concentrating solar power (CSP)”
5 industries, industries in which I understand SunEarth, Inc. does not currently participate, even in
6 the United States. Rather, that company has testified it has concentrated its business, as I
7 understand it, almost exclusively in the SWH industry, which the PHOTON International website
8 does not even mention.

9 87. According to information we have received from the Photon Group, PHOTON
10 International has a print run of approximately 28,000 copies per month for its English edition. I
11 understand that Plaintiffs represent that a little more than 1,000 of those copies are sent to
12 subscribers in the United States. Plaintiffs also contend that this magazine is distributed at trade
13 shows. But another exhibit attached to their earlier motion papers (Dkt. No. 90-15, Ex. 7 to
14 Plaintiff’s Proffitt Declaration) lists about 100 shows at which the publication is distributed, only
15 seven of which are in the United States.

16 88. By contrast, “PHOTON – The Photovoltaic Magazine,” which is aimed at the
17 United States market, has a larger print run, approximately 40,000 copies per month, most of
18 which I assume would be distributed in the United States. As noted above, we do not place any
19 advertising in that United States market publication.

20 89. We ask, therefore, that we be permitted to continue to place ads in PHOTON
21 International, as we have done since 2004. If the Court feels it necessary, we would include in
22 the text of the ad a disclaimer, similar to ones the Court has already ordered, that any products
23 sold in the United States are branded NBSolar.

24 **IV. SESP’S LACK OF PROFITS ON U.S. SALES IN 2011**

25 90. In 2011, SESP made sales in the United States of 54,071,583 renminbi (RMB).
26 (Ex. 92 at 9, Sec. 1.12, “sales volume”).

27 91. It cost SESP 52,655,455 RMB to manufacture these panels. (Id. at 9, Sec. 2,
28 “sales volume”).

1 92. In addition to the manufacturing costs, SESP incurred 4,478,904 RMB in expenses
2 that actually contributed to sales of the accused products in 2011. (Id. at 10, Sec. 4, “Sub Total”.)
3 These expenses consisted of seven categories.

4 93. First, SESP spent 81,765 RMB to obtain UL certification for SESP’s panels sold
5 in the United States in 2011. (Id. at 10, Sec. 4.1.)

6 94. Second, SESP spent 1,279,400 RMB to have SESP’s panels listed on the
7 California Energy Commission’s list of devices eligible for financial incentives. (Id. at 10, Sec.
8 4.2.)

9 95. Third, SESP spent 492,245 RMB on air travel and other expenses associated with
10 attending various business conferences and meetings in the United States in 2011. (Id. at 10, Sec.
11 4.3.)

12 96. Fourth, SESP spent 206,232 RMB on salaries and bonuses for its employees
13 working to sell products in the United States in 2011. (Id. at 10, Sec. 4.4.)

14 97. Fifth, SESP spent 48,115 RMB on business travel expenses in the United States in
15 2011, in addition to the expenses noted above. (Id. at 10, Sec. 4.5.)

16 98. Sixth, SESP spent 1,176,851 RMB on costs related to interest payments on SESP’s
17 loans in 2011 are allocable to SESP’s sales of panels in the United States. (Id. at 10, Sec. 4.6.)

18 99. Seventh, SESP spent 1,194,296 RMB on freight and insurance fees for panels sold
19 in the United States in 2011. (Id. at 10, Sec. 4.7.)

20 100. SESP’s lack of profits is consistent with a June 2011 Bloomberg article provided
21 by Plaintiffs, which noted that “[m]anufacturers of solar cells, the device fastened to panels for
22 converting sunlight into electricity, have cut their price about 21 percent this year, prompting
23 panel makers to follow suit...” (Ex. 338 at 3.) Another 2011 article provided by Plaintiffs noted
24 that “many China-based solar firms will likely suffer from this fast and furious slash of quotes.”
25 (Ex. 339 at 2.)

26 **V. CYBERSQUATTING**

27 101. SESP purchased the sun-earth.com domain in August 2007. (Ex. 186 at 4.)
28

1 102. SESP designed the sun-earth.com website to redirect Internet visitors to
2 nbsolar.com, SESP's main website from 2003 until 2010, where it prominently displayed the
3 Sun-Earth trademark. (Ex. 314.) Thereafter, SESP used the sun-earth.com website to display the
4 Sun-Earth trademark. (Ex. 314.) SESP has therefore always used the sun-earth.com domain to
5 promote SESP's own business since acquiring the domain in 2007. It has no intention of selling
6 or transferring the domain, and has rejected Plaintiffs' offer to acquire the domain. (Ex. 21, at 4-
7 6.)

8 103. In 2010, as it became clear that the Trademark Office would register SESP's Sun-
9 Earth trademark, SESP registered additional websites incorporating that trademark. In February
10 2010, having receiving no opposition to the publication of its Sun-Earth trademark in November
11 2009, SESP registered the sunearth.us domain. (Ex. 192.) On November 2, 2010, SESP received
12 notice that the Trademark Office had accepted SESP's Statement of Use regarding its Sun-Earth
13 trademark registration. (Ex. 66 at 6.) Later that month, SESP registered the following domains
14 incorporating its Sun-Earth trademark: sunearthpower.net; sunearthpower.com;
15 sunearthsolarpower.net; sunearthsolarpower.com; sunearthsolar.net. (Ex. 193.)

16 104. SESP currently uses or has plans to use these additional domains to replicate the
17 content on its sun-earth.com website (collectively, the "Sun Earth Domains"). As with the sun-
18 earth.com domain, SESP used these websites to promote its own business and has no intention of
19 selling the domains.

20 105. SESP has registered the Sun-Earth trademark in numerous countries outside the
21 United States. (Exs. 302-308.)

22 106. SESP's Sun Earth Domains include part of SESP's legal name, Sun Earth Solar
23 Power Co., Ltd.

24 107. SESP uses the Sun-Earth trademark to capitalize on the goodwill that SESP has
25 established globally, particularly with utility companies in Europe. As discussed in Paragraph 53,
26 we have never had any desire to be identified with Plaintiff SunEarth Inc. In any event, there is
27 no risk of any confusion occurring in the United States because SESP has blocked United States
28 visitors from accessing the Sun Earth Domains.

1 108. SESP did not provide any false or misleading contact information when it
2 registered the Sun Earth Domains. When registering the domains, SESP provided contact
3 information for SESP employee Cai Ye, myself, or “Ningbo Taiyangneng Dianyuan Youxian
4 Gongsi,” the pinyin spelling of SESP’s former name, Ningbo Solar Electric Power Co. (Exs. 193,
5 310-312, 315.)

6 109. For the reasons described in Paragraph 18, and because SESP had rights in the
7 Sun-Earth trademark when it registered the Sun Earth Domains in 2007 and 2010, we believed,
8 and continue to believe, the registrations were lawful.

9 **VI. MISCELLANEOUS**

10 110. As previously discussed, after we were surprised by Plaintiffs’ cancellation
11 petition before the TTAB, we believed our use of the Sun-Earth mark in the United States in 2011
12 was not likely to cause confusion. The Court, however, took a different view in its preliminary
13 injunction order on February 3, 2012. We recognized we had an uphill battle to persuade the
14 Court to change its mind. In light of the Court’s order, we abandoned any plans to continue doing
15 business under the Sun-Earth brand in the United States. We expected that our decision would
16 leave little to fight over and sought to bring the litigation to a conclusion at a mediation session
17 on March 23, 2012.

18 111. Regrettably, Plaintiffs have been unwilling to accept the Court’s Modified
19 Preliminary Injunction and so have insisted on dragging out for months this dispute, imposing
20 upon both parties unnecessary expense.

21 112. Seeking to end this lawsuit, on April 2, 2012 we served an offer of judgment to
22 make permanent the terms of the Court’s Modified Preliminary Injunction of March 17, 2012, to
23 consent to cancellation of SESP’s Sun-Earth trademark registration, and to pay Plaintiffs a sum of
24 money.

25 113. On July 12, 2012, while meeting with Plaintiffs and Magistrate Judge Cousins, we
26 again offered to make permanent the terms of the existing injunction. Despite Defendants’ best
27 efforts, however, no settlement was reached.
28

1 114. As a result of the extraordinary expense of this lawsuit, combined with a difficult
2 market for photovoltaic products, Defendants have been forced to bring to a halt nearly all
3 business operations in the United States.

4
5 Dated: October 8, 2012

By: /s/ Yuming Dong

Yuming Dong